In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION et al.,
Petitioners

— v —

JO CAROL LA FLEUR et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing, with one Judge dissenting, a decision of the United States District Court for the Northern District of Ohio, Eastern Division, which had dismissed respondents complaints.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is as yet unreported. It is set forth in the Appendix, *infra*, at pp. A-14. The opinion of the District Court is reported in 326 F. Supp. 1208 and is set forth in the Appendix, *infra*, at pp. A-1.

pounds and are subject to fears of miscarriage, difficulty in labor and abnormalities in their child that, in the stress situation of teaching in public school, makes them not as able to fulfill their duties as when not pregnant.

All of the above testimony was undisputed.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted because the decision below is directly in conflict with a very recent decision of this Court and in conflict with two very recent decisions of other circuits, one of which is soon to be heard by this Court since certiorari has been granted. The question involved is an important Constitutional one which affects almost every school district in the United States.

1. *The decision below is in conflict with the decision of this Court in Reed v. Reed.*

After this case had been argued in the Sixth Circuit but before a decision had been rendered, this Court decided the landmark case of *Reed* v. *Reed*, 404 U.S. 71 (1971).

In *Reed* this Court struck down an Idaho statute which gave preference to men in Probate Court appointments. This Court held the statute was purely arbitrary and unreasonable. However, this Court adopted the standard of reasonableness as that by which statutory sex classification should be judged, for Fourteenth Amendment purposes. This Court said:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' " 404 U.S. 71, 76.

This Court did not adopt nor comment upon, although urged to do so by "Women's Liberation" groups, the standards by which discriminations based on race are judged for Fourteenth Amendment purposes, i.e., the "strict scrutiny" test which cancels the normal presumption of constitutionality, removes the burden of proof from the plaintiff challenging the regulation and places a heavy burden on the governing body which is attempting to justify the differential treatment. "*Sex Discrimination and Equal Protection: Do we need a Constitutional Amendment*" 84 Harv. L. Rev. 1499, 1502-1516 (1971) *Brown, et al., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women,"* 80 Yale L.J. 871.

Reed had been anticipated by *Dandridge* v. *Williams*, 397 U.S. 471 (1970), where this Court clearly called a halt to further extension of the strict scrutiny rule into state regulation of social and economic matters. Indeed, the majority opinion in *Dandridge* relies on *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), which upheld a sex-based classification prohibiting female bartenders, 397 U.S. at 485.

While the opinion below in the case at bar pays lip service to *Reed* by quoting a passage from it (*not* the passage quoted above which establishes the rule of reasonableness), it ignores the rule of *Reed* and holds the maternity leave rule void for "overbreadth". The majority opinion quotes a short excerpt from the medical testimony and reaches the unjustified and incorrect conclusion that the medical evidence "under no construction of this record" supports the maternity leave rule. Fortunately, the dissenting opinion of Chief Judge Phillips contains a more accurate summary of the medical evidence on the complications, disorders and discomforts of pregnancy. What the Sixth Circuit majority has done is to adopt the strict scrutiny rule for a sex discrimination case and ignore the mandate of this Court in *Reed*.

2. *The decision below is in conflict with Struck v. Secretary of Defense, a Ninth Circuit decision presently under Review in this Court.*

This Court has recently, on October 24, 1972, granted *certiorari* in the Ninth Circuit case of *Struck* v. *Secretary of Defense*, case number 72-178, on the docket of this Court, 41 Law Week 3220. The Ninth Circuit had upheld an Army Air Force regulation that required resignation from service for a pregnant female officer.

The majority in the Court below attempted to distinguish the *Struck* case as being one which dealt with "pregnancy of a female officer in a war zone", thus implying that a female officer in a war zone somehow did not have the same Equal Protection rights that a pregnant school teacher had. If *Struck* was correctly decided by the Ninth Circuit, and this Court is about to inquire into that, then the decision of the majority below in the case at bar is in conflict with it.

3. *The decision below is in conflict with Schattman v. Texas Employment Commission, a decision of the Fifth Circuit.*

In *Schattman* v. *Texas Employment Commission*, 459 F. 2d. 32 (March, 1972) the Fifth Circuit upheld a mandatory maternity leave rule. The Fifth Circuit reviewed the medical testimony before it which was very similar to the medical testimony in the case at bar. It then applied the rule of reasonableness of *Reed* v. *Reed* and concluded that the regulation was valid.

The Sixth Circuit majority attempted to distinguish *Schattman* on the ground that the mandatory maternity leave rule in that case was not as onerous as that of Cleveland since it applied only at the seventh instead of the fifth month of pregnancy. The majority opinion is in error. The *Schattman* opinion covered not only terminations at

the end of the seventh month of pregnancy, but also terminations at the end of the fifth, thus making it practically identical with the Cleveland rule. At p. 40 of *Schattman* appears this statement:

> "The record further shows that one Texas agency terminates its women employees at the end of the fifth month of pregnancy and others at the end of six months. Still others terminate at the end of the seventh month."

Furthermore, the Cleveland rule is not as onerous as the *Schattman* rule because Cleveland provides for automatic reinstatement at the end of the maternity leave while *Schattman's* rule does not. The *Schattman* court found no Constitutional infringement in these varying times for application of the rule nor should it. The true criterion is whether the evidence establishes that the rule is reasonable and bears a fair and substantial relation to the object of the legislation.

The dissent in the Sixth Circuit in the case at bar states it thus:

> "In my view it is not the prerogative of this Court to determine whether a better regulation could be promulgated or whether a shorter period of time than the end of four months of pregnancy should be proscribed. We do not sit as a super Board of Education. Our concern is whether the regulation creates an arbitrary or unreasonable classification wholly unrelated to the objectives sought to be advanced by the Board of Education in adopting it. In my opinion we should not strike down the regulation because it 'may be unwise, improvident, or out of harmony with a particular school of thought,' See *Dandridge* v. *Williams*, 397 U.S. 471, 484."

4. *This Court should squarely decide the important question of Federal Law involved in this case.*

The important question of Federal Law involved in this case is whether statutory differentials based on sex are to be judged, for Fourteenth Amendment purposes, by the standard of reasonableness. *Reed* applied that standard but did not, in so many words, expressly reject the "strict scrutiny" standard applied in race discrimination cases. The Court below, as the dissent points out, limited or misread *Reed*. The question is an important one. Already the Fourth Circuit has adopted the language of the Court below in deciding a similar case, *Cohen* v. *Chesterfield County School Board*, ... F. 2d. ....., Sept. 14, 1972, case No. 71-1707, motion for rehearing and suggestion for rehearing *en banc* pending, opinion below, 326 F. Supp. 1159 (E.D. Va. 1971). Chief Judge Blumenfeld of the District of Connecticut has rejected the District Court opinion in *Cohen* and expressly adopted that of Judge Connell, the District Judge in this case, *Green* v. *Waterford Board of Education*, 5 Emp. Pr. Dec. para. 7979, as has the Pennsylvania Commonwealth Court, *Cerra* v. *School District*, 4 Fair Emp. Pr. Cases 79 (1972). Lastly, the question is important in the light of the Equal Employment Opportunity Act of 1972, P.L. 92-261, which, as amended, now applies to public school employment, Sections 701 and 702 of P.L. 92-261. *One week* after the passage of this 1972 act the Equal Employment Opportunity Commission issued new rules containing "guidelines" on mandatory maternity leaves. 37 Fed. Reg. 6837. These guidelines make it a *prima facie* violation of Title VII for an employer to exclude employees "from employment . . . because of pregnancy . . ." 29 Code of Fed. Reg. 1604.10(b). These guidelines do not have the force of Federal Law, although probably entitled to "great deference", *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

Surely it is important for this Court to examine, at this time, in the light of conflicting judicial decisions and administrative fiat, whether the rule of reasonableness is

to be applied to statutory sex classifications in all situations.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF DISTRICT COURT.

Nos. C 71-292, C 71-333

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JO CAROL LA FLEUR
Plaintiff

v.

CLEVELAND BOARD OF EDUCATION et al.
Defendants

ANN ELIZABETH NELSON
Plaintiff

v.

CLEVELAND BOARD OF EDUCATION et al.
Defendants

MEMORANDUM OPINION AND ORDER

CONNELL, *District Judge*

This case has been presented to this Court asking for injunction against the defendant, Cleveland Board of Education, from enforcing a regulation of the Cleveland School Board prohibiting teachers who become pregnant from teaching their classes past the fourth month of pregnancy.

The plaintiffs in the case, Jo Carol La Fleur and Ann Elizabeth Nelson are teachers in the Cleveland public school system. Both teachers are married and pregnant; Mrs. La Fleur is expecting birth of her child sometime from the mid to the end of July of this year, while Mrs. Nelson expects her child on August 26, 1971.

Mrs. Jo Carol La Fleur, C 71-292, is a teacher at Patrick Henry Junior High School and has taught her class from September 1970 until March 12, 1971, when, due to the enforcement of the school board regulation, she was asked to discontinue her duties due to her pregnancy. The plaintiff, La Fleur, taught a seventh grade class composed exclusively of girls who are designated as underachievers or problem children. This class is called a "project transition" class which is supervised and operated by the Cleveland public schools and partially funded with Federal money. This class is composed exclusively of girls, about twenty-five in number, who are to be given special attention for purposes of making them ready for the eighth grade in school. Mrs. La Fleur did not request the maternity leave, rather the regulation was enforced as to this plaintiff and her maternity leave was involuntary. Presently, in her absence, the class is being taught by a substitute teacher.

The plaintiff, Ann Elizabeth Nelson, C71-333, is a French teacher at Central Junior High School. She has taught French to seventh, eighth and ninth grade students since September 1970. Mrs. Nelson reported her pregnancy to her principal on January 29, 1971, and applied for maternity leave.

This case came on for hearing on April 19, 1971. The issues being identical in nature, the cases were tried and submitted together and both will be decided in this memorandum and order.

The regulation in question concerns maternity leaves of absence for teachers and is stated on pages 20-21 of the teachers handbook, Joint Ex. 1. The regulation provides that:

> "Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay."

The application of this regulation provides that the absence shall be effective not less than five months before the expected date of the normal birth of the child. Further, the regulation states that in application; this leave of absence shall be effective not less than five months before the expected date of the normal birth of the child, and application for such leave to the superintendent at least two weeks before the effective date of the leave of absence.

[1] The plaintiffs contend that this regulation discriminates against the plaintiffs as female employees with respect to their employment and deprives them of their "rights, privileges and immunities secured by the Constitution and laws of the Civil Rights Act of 1871, (42 U.S.C. § 1983)." Plaintiffs pray this court grant a declaratory Judgment ruling that the policies and practices of the school board are unlawful, and further the plaintiffs request the granting of a preliminary and permanent injunction enjoining the Cleveland Board of Education from discriminating against the plaintiffs on the "basis of sex with respect to the terms and conditions and privileges of her employment and compensation thereof in deprivation of her rights, privileges and immunities secured by the United States Constitution and laws and the Civil Rights Act of 1871."

The defendants maintain that the regulation is a "valid exercise of the school board's statutory authority to

make rules and regulations for its government and the government of its employees and the pupils of the school, pursuant to Ohio Revised Code Section 3313.20." The defendants further contend that "the maternity leave policy violates no constitutional rights of the plaintiff and is not discriminatory in any sense, let alone a per se discrimination based wholly on sex."

This Court reads the complaint as being brought pursuant to 42 U.S.C. § 1983 for an alleged violation of the plaintiffs' guarantee of equal protection under the Fourteenth Amendment to the United States Constitution. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343; giving the district court original jurisdiction to hear cases for redress of deprivations arising under color of State law for alleged violations of privileges or immunities secured by the Constitution of the United States or by any act of Congress providing for the equal rights of citizens.

It is necessary to point out that the plaintiffs have not brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The facts show that the maternity regulation in question was adopted in the early fifties upon the request of Dr. Mark C. Schinnerer, Superintendent of the Cleveland public schools. Prior to this time no maternity leave regulation had been in effect. The rule as it appears today is essentially the same as it was when adopted. The change in the rule now permits the mother to return at the beginning of the semester following the age of three months of the new child rather than the six months as previously provided. Also, the regulation now asks for one month's notice of pregnancy leave prior to the termination of employment rather than two weeks' notice as stated in the regulations as it now appears.

The evidence shows that prior to the rule, the teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study. The evidence shows that there were numerous reports of similar incidents which brought about the need for the Board of Education to prevent the continuance of this disruptive situation.

The evidence further shows that there were many instances where teachers refused to voluntarily withdraw from teaching until the birth of the child; and although no child was born in the classroom, a few times it was very close. The evidence shows that in one instance where a teacher's pregnancy was advanced, children in a Cleveland junior high school class were "taking bets on whether the baby would be born in the classroom or in the hall." Dr. Schinnerer testified that the purpose of this rule was to protect the teacher and maintain the continuity of the classroom program; the prevention of disruption in the educational process. When the regulation was presented to the Board of Education for adoption, at a public meeting, the vote of the Board of Education was unanimous.

The Cleveland Board of Education is concerned with the well-being of over 5800 teachers, of which 3774 are women. It is further pointed out that fifty percent of these women are of childbearing age, and that an average of 225 teachers are on maternity leave at all times.

A plaintiffs' witness testified that the incidence of violence in the Cleveland schools had increased steadily over the last ten years. The concurring evidence of Mr. Julius Tanczos, Supervisor of Secondary Organization of the Cleveland public schools shows that there were 256

assaults upon teachers by pupils and others, within the school buildings in the 1969-70 school year. The record shows that up to the date of the lawsuit, 140 such assaults had already taken place. The school system classifies an assault as the physical contact with the person or the threatening of a teacher with a weapon. This year alone, there has been the confiscation of 46 guns and 18 knives in the Cleveland public schools. Further it is shown that there were 136 teachers accidentally injured as the result of falls in corridors and hallways during the 1969-70 school year.

The duties of a teacher in the Cleveland public schools require her to be on her feet much of the day, and aside from teaching, they include the maintenance of order in the classrooms and the supervision of the movement of students in the halls, corridors and sometimes in the cafeterias. In addition to the teachers, the public school system employs 132 security guards which are stationed in the secondary schools, grades seven thru twelve, for the specific purpose of maintaining order and keeping outsiders from entering the school building.

With respect to the health of a pregnant teacher, during a normal pregnancy, the woman should gain between fifteen and twenty pounds. Pregnancy is a normal condition; and these individuals may continue to lead normal lives, however, the evidence shows complications can arise and the resulting effects can be very serious.

The evidence shows that toxemia occurs in as high as ten percent of pregnancies. This condition can occur slowly and may be unforeseen and will prohibit the individual from working until the condition is brought under control. The more serious complication of placenta previa occurs in one percent of the pregnancies and this condition is very serious and its gravity greatly increases should it occur after the sixth month. This condition can be

brought about by a sudden or violent physical exertion and can result in the woman's death; immediate hospitalization is required.

It is further shown that the frequency of urination increases during the last three months of pregnancy, the woman's agility is impaired, and strenuous, sudden, physical exertion is forbidden.

The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program.

The Cleveland Board of Education is authorized to initiate such rules and regulations pertaining to employees and pupils as are necessary for the operation of its government. See Ohio Revised Code § 3313.20. The regulation in question had been made pursuant to this state statute

and from this state action the Fourteenth Amendment question comes before this Court.

In Morey v. Doud, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1458 (1954) the Court summarized the rules for testing discrimination under the Fourteenth Amendment and states as follows:

> "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79, [31 S.Ct. 337, 55 L.Ed. 369] (1911).

In speaking of the "Equal Protection" clause of the Fourteenth Amendment, the Court in McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1960) stated:

> "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some in-

> equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In Williams v. McNair, D.C., 316 F. Supp. 134, 136 (1970) a three judge panel in deciding whether men have the right to gain admission to an all girl's college said:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Limitations placed upon women have been held as non-discriminatory. In Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908) the Court in deciding upon a work hour limitation statute pertaining to women took into consideration the differences in the sexes and said:

> "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."

The Court in Seidenberg v. McSorleys' Old Ale House, Inc., D.C., 317 F.Supp. 593 (1970), found no justification for a rule which excluded women as potential customers in an ale house while giving preference to men.

This court finds that the enormous task of providing an education for thousands of young students, and the regulations enacted in the furtherance of this purpose has no relevance to a regulation enacted by an ale house prohibiting the sale of alcoholic beverages to women and will be given no weight by this Court.

The plaintiffs cite Schattmann v. Texas Employment Commission, 3 CCH para. 8146, p. 6459 (W.D.Tex.1971) in which jurisdiction for relief is based upon Title VII of the Civil Rights Act of 1964, § 2000e et seq. of Title 42 U.S.C., as earlier pointed out, this is not the basis of jurisdiction in the instant case and the resulting difference in the applicable test is afforded little consideration. Furthermore, *Schattmann* did not involve a situation in which the education of children presented a most important issue. In *Schattmann*, supra, p. 6460, the stipulation that the plaintiff "was a permanent desk worker whose job entailed no significant physical exertion or personal contact with the public" could not be further from the necessary demands of a junior high school teacher responsible for the education of students in the Cleveland schools.

[2] The plaintiffs maintain that the traditional "reasonable basis test", *Lindsley, supra,* is not applicable in this case. Their contentions being that Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), requires that for this Court to uphold the regulation in question the states meet the burden of showing a compelling state interest. In *Shapiro,* what was in question was the plaintiff's right to travel in interstate commerce and its resulting qualification for public assistance. In this instance the Court stated on page 638, 89 S.Ct. on page 1333:

> "Since the classification here touches on the fundamental right of interstate movement, its constitution-

> ality must be judged by the stricter standard of whether it promotes a compelling state interest."

The *Shapiro* case requires a stricter standard in judging cases involving fundamental rights. However, allegations alone are not the criteria for automatic application of this standard.

[3] The plaintiffs, citing *Shapiro*, presume their contentions are of fundamental concern preempting the considerations of the school board and giving rise to the application of this stricter standard. The primary duty of the school board is to educate students, and if necessary, regulations may be enacted in the furtherance of this function. Education is the right of a child, and the school board is before this Court protecting these rights which involved the thousands of students within its jurisdiction.

Speaking of this right, the Supreme Court stated in Brown, et al. v. Board of Education of Topeka, et al., 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) that:

> "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[4] The rights in this case weigh most heavily with the students, and this Court holds that those assaulting this most serious concern of the school board must meet the traditional equal-protection test of showing that the regulation is without a reasonable basis.

The Cleveland public schools had operated prior to the early 1950's without this maternity leave rule, and the experiences were such that the Board was compelled to adopt a regulation to remedy this impediment to its educational function.

This requirement of maternity leave gives the school the best assurances that sudden disruption of the stu-

dents' classroom program due to an unforeseen complication in the teacher's condition will be minimized. The requirement of advance notice of termination also allows time for a substitute teacher to work and train with the intended class prior to assuming her full responsibilities, further maintaining continuity in the classroom program. The provision for resumption of employment after the child's birth serves the purposes of maintaining classroom continuity and protecting the health of the mother and child.

This regulation has minimized the classroom distractions and disruptions which had occurred prior to its adoption, further attesting to its necessity and reasonableness, and this court so finds.

The problem of the teacher's health and safety, before and after the child's birth, is of itself a valid concern of the school board aside from its interest in the students' education.

In an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury.

This court finds that for the reasons stated herein, the regulation in question is entirely reasonable, and most adequately meets the prescribed tests.

This court finds that the Cleveland Board of Education has not discriminated as to women whose condition is attendant to their sex.

This court finds that there is a reasonable basis for the rule which distinguishes pregnant teachers from all other teachers.

This court finds that no showing of a violation of the plaintiffs' constitutional rights has been made.

This court finds that the regulation furthers the design for quality education, and serves the important interests of the students in implementing this fundamental right.

This court finds that the plaintiffs' burden of showing that the maternity leave of absence is arbitrary and unreasonable has not been sustained.

In accordance, the maternity regulation of the Cleveland Board of Education is sustained in its entirety.

This constitutes the findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

It is so ordered.

OPINION OF THE COURT OF APPEALS

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZABETH NELSON,
Plaintiffs-Appellants,
v.
CLEVELAND BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed July 27, 1972.

Before: CLARK, Associate Justice,* PHILLIPS, Chief Judge, and EDWARDS, Circuit Judge.

EDWARDS, Circuit Judge. This is a complaint alleging violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. It is brought on behalf of two pregnant school teachers in the Cleveland school system under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Each has been placed on "maternity leave" involuntarily and seeks reinstatement with back pay and injunctive relief against the implementation of the school board's maternity leave policy. Each claims that the school board's rule is an unconstitutional discrimination on grounds of sex.

The rule appellants attack has the effect of requiring a pregnant teacher to take unpaid leave of absence from

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

her school duties five months before the expected birth of a child and to continue on such status thereafter until the beginning of the first school term following the date when the baby becomes three months old.

The school board rule under attack provides as follows:

> "Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.
>
> "APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*
>
> "REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.
>
> "When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (emphasis in original)

The District Judge who heard this case took extensive testimony, made findings of fact and concluded that the Cleveland Board of Education's rule did not discriminate against women and was not so unreasonable or arbitrary as to be unconstitutional. The basic rationale for the District Judge's holding is set forth as follows:

> "The evidence shows that the primary purpose for the initiation of this rule was to protect the continuity of the classroom program. The school board maintains this rule in an attempt to bring the disruption of the classroom program to a minimum. They further maintain that use of the one month advance notice requirement gives the school board the most accurate indication as to when the teacher will discontinue her duties and the new instructor will assume the responsibility of the study program. The purpose is also to allow the new teacher to become familiar with the classroom program and the students under the guidance of the original teacher who is about to depart. Furthermore, the purpose is to give the school board notice so that the original teacher's unexpected and sudden leave will not occur, and thus guaranteeing classroom continuity and providing the best possible safeguard against the disruption of the students' education. The intended purpose of the section in the regulation which permits the teacher to return at the beginning of the regular school semester following the child's age of three months is designed to protect the health of the mother and the child and assure continuity of the classroom program." *La Fleur* v. *Cleveland Board of Education*, 326 F. Supp. 1208, 1211 (N.D. Ohio 1971).

Appellants' contentions are that the rule is arbitrary and unreasonable in its overbreadth and that it is a discriminatory rule applicable to only one sex, in violation

of the equal protection clause of the Fourteenth Amendment.

It is relevant for us to note two developments which have occurred since this case was argued. First, in a split decision a panel of the Fifth Circuit held a distinctly less onerous maternity leave rule of the Texas Employment Commission not to be arbitrary and unreasonable in a constitutional sense. *Schattman v. Texas Employment Commission*, — F.2d — (5th Cir. 1972). (Decided March 1, 1972, order amending Judge Wisdom's Opinion dated March 17, 1972.)

Second, Congress has now amended Title VII of the Equal Employment Opportunity Act to make it applicable to public schools. 42 U.S.C. § 2000e(a), P.L. 92-261, 86 Stat. 103 (1972). The EEOC has also adopted a rule prohibiting special maternity leave disability rules as discriminatory on grounds of sex. 29 C.F.R. § 1604.10(b), 37 Fed. Reg. 6837 (April 5, 1972).

While clearly neither of these last decisions controls our present case, they do tend to lessen the reach of our holding.

The Cleveland Board of Education maternity leave rule was adopted in 1952. It is considerably more severe in its effect upon employment of pregnant teachers than the Texas Employment Commission rule dealt with in the *Schattman* case, or any other similar rule which has been called to our attention. Depending on the period of the year when the birth of the child was expected, the effect of the rule would be to put any pregnant teacher on involuntary leave for a period ranging from six months to over a year. The Texas Employment Commission rule required leave to be taken two months before expected birth and an application to return to work could be filed at any time thereafter.

The principal social purpose claimed to be served by the Cleveland Board of Education rule is continuity of classroom instruction and relief of burdensome administrative problems. Yet any actual disability imposed on any teacher, male or female, poses the same administrative problems and many (including flu and the common cold) can't be anticipated or planned for at all. This rule may arguably make some administrative burdens lighter. But these are not the only values concerned. The Supreme Court reminds us:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley* v. *Illinois*, — U.S. — (1972) (decided April 3, 1972) (Slip Opinion at 11-12). (Footnotes omitted.)

The three month enforced unemployment after birth has no relation to the employer's interest at all. While having a mother with her infant for a period after birth may arguably be a question of general state concern, Ohio has not thus far expressed it in any general and nondiscriminatory statute.

Appellees also urge consideration of a view expressed by the author of this rule when in 1952 he suggested its adoption. Dr. Schinnerer testified that he thought that absent the rule, pregnant teachers would be subjected to "pointing, giggling and . . . snide remarks" by the students. Basic rights such as those involved in the employment relationship and other citizenship responsibilities cannot be made to yield to embarrassment. *See Abbott* v. *Mines,* 411 F.2d 353 (6th Cir. 1969). Additionally, at the present time pregnant students are allowed to continue in the Cleveland schools without any apparent ill effects upon the educational system.

If there is substantial support for the Cleveland Board of Education rule to be found in this record, it must be in the testimony of the Board's witness Dr. William C. Wier, who discussed the problems of pregnancy with obvious concern. But Dr. Wier also testified that "each pregnancy is an individual matter." And his cross-examination concluded as follows:

"Q How would you advise a working woman who is pregnant as to her continued employment?

A I would first inquire what type of employment she was on — doing. If it involved physical activities, and in excess of what I would consider normal or potentially in excess, I would advise her probably that she should stop working at an earlier time than somebody who was sitting entirely at a desk job.

* * *

A (Continuing) What I was going to say is that I have had patients that worked as secretaries throughout pregnancy, and I have seen nurses that worked in the hospital going to term and practically going from the nurse's station up to the delivery room.

Now, usually the hospitals — in this situation, would put these nurses in the type of job on the hospital floor in which their physical activities were considerably reduced, and not require them to do as much; but in general I have never said to a patient, 'You can't do this or that.' I can only advise them.

Q Doctor, have you treated patients who have worked through or worked beyond the end of the fourth month of their pregnancy?

A Of course I have — many.

Q Have you always disapproved of this?

A No.

Q Have you told the women to stop working?

A I have on occasion suggested it would be a wiser thing if they discontinued work.

Q But not always?

A Oh, no."

Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory maternity leave required by the rule both before and after birth of the child.

In a case decided after the District Court decision in this case, the United States Supreme Court invalidated a statute of the State of Idaho which specifically preferred male relatives over female relatives as administrators of estates. The Court's opinion commented:

"Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elim-

> ination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971).

Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth. As the Supreme Court said in *Wieman* v. *Updegraff*, 344, U.S. 183 (1952):

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id* at 192.

We believe that the Fifth Circuit's decision in *Schattman* v. *Texas Employment Commission, supra,* is easily distinguishable on the facts and that the same is true in relation to *Struck* v. *Secretary of Defense*, — F.2d — (9th Cir. 1971), which dealt with pregnancy of a female officer in a war zone. On the other hand, there is a marked trend of cases to invalidate regulations based on sex classifications unless supported by a valid state interest. *Reed* v. *Reed, supra; Sail'er Inn* v. *Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); *Cohen* v. *Chesterfield County School Board*, 326 F. Supp. 1159 (E. D. Va. 1971); *Seidenberg* v. *McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S.D. N.Y. 1970); *Kirstein* v. *Rector of University of Virginia,*

309 F. Supp. 184 (E. D. Va. 1970); *Heath* v. *Westerville Board of Education, et al.* — F. Supp. — Civil #71-379, S.D. Ohio June 29, 1972.

We do not, of course, by our holding concerning this rule deal with reasonable employer requirements of notice of impending disability or of health examinations or certificates. Such issues are not presented by this appeal.

The judgment of the District Court is vacated and reversed and the case is remanded for further proceedings consistent with this opinion.

PHILLIPS, Chief Judge. (Dissenting in part, concurring in part.) I respectfully dissent from the part of the majority opinion which strikes down the regulation pertaining to maternity leave prior to delivery.

It is my opinion that the pre-delivery part of the rule of the Cleveland Board of Education under attack on this appeal is a permissible and reasonable exercise of the discretion vested in the Board in the administration of the school system. I see no violation of the rights of teachers under the Equal Protection Clause presented by the facts and circumstances of this case.

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . .
>
> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

The capabilities of its teachers and the maintenance of sound educational environment are matters of legitimate concern to the Board of Education. The evidence presented to the District Court shows that about 225 out

of the more than 5800 teachers employed by the Board in the Cleveland school system are on maternity leave at any given time and that approximately 1900 teachers are women of child bearing age. Expert testimony established that every pregnancy impairs to some degree the ability to teach and supervise children. Pregnancy limits the capacity of the teacher to engage in normal physical activity. Mobility is reduced. A pregnant teacher is subjected to an increased risk of unexpected incapacitation. Such impairment and risk increase during the later months of pregnancy. There is no question that the medical condition of a pregnant teacher will require that she discontinue teaching at some point during the course of the pregnancy.

Appellants urge that the determination of this point of time should be made on an individual basis, relying on the thirty day notice requirement as ample to meet the objectives of the Board. The record in this case convinces me that there is no assurance that an individualized decision in all cases can be made thirty days prior to the time that medical necessity may require a teacher to discontinue her classroom duties. To impose upon the school system the obligation of examining each teacher individually throughout the course of her pregnancy to insure that she is capable of carrying out the manifold and demanding duties of her profession would constitute a burden more onerous than mere administrative inconvenience.

In my view it is not the prerogative of this court to determine whether a better regulation could be promulgated or whether a shorter period of time than the end of four months of pregnancy should be prescribed. We do not sit as a super Board of Education. Our concern is whether the regulation creates an arbitrary or unreasonable classification wholly unrelated to the objectives sought to be advanced by the Board of Education in adopting it. In my

opinion, we should not strike down the regulation because it "may be unwise, improvident, or out of harmony with a particular school of thought." *See Dandridge* v. *Williams*, 397 U.S. 471, 484.

Nor do I agree that the regulation should be invalidated because it applies only to pregnancy and not to other conditions and diseases that incapacitate teachers, both male and female, from classroom duties. It is true that, during the course of a school year, a certain number of teachers will experience illness or accidents requiring leaves of absence. The wide range of these incapacitating conditions is such that the Board of Education has seen fit to deal with them on an individual basis. Pregnancy, on the other hand, is a condition of predictable duration and symptoms involving a substantial number of teachers every year. In my opinion a classification dealing with this problem is not so arbitrary or unreasonable as to violate the Equal Protection Clause.

It is not every classification that amounts to a denial of equal protection.

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . [C]lassifications will be set aside only if no grounds can be conceived to justify them. With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' and a legislature need not run the risk of losing an entire remedial scheme simply because it failed . . . to cover every evil that might conceivably have been attacked." *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969) (citations omitted).

Upon the evidence presented in the District Court, Judge Connell found that the requirement of maternity leave prior to delivery gives the school system the best assurance that sudden disruption of the classroom program due to unforeseen complications in the condition of a teacher will be minimized. 326 F.Supp. at 1213. I agree with this conclusion. In my view it is not "clearly erroneous." Rule 52(a), Fed. R. Civ. P.

With respect to the three months post-delivery waiting period before resuming teaching, I agree with the majority opinion. No evidence was introduced in the District Court and no reasons offered to this court as to how this requirement is related rationally to any legitimate objective of the Board.

I would affirm in part and reverse in part.

ORDER ON MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed August 29, 1972)

No. 71-1598

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JO CAROL LA FLEUR AND ANN ELIZABETH NELSON,
Plaintiffs-Appellants,
v.
CLEVELAND BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.
} ORDER

Before: CLARK, Associate Justice,* PHILLIPS, Chief Judge, and EDWARDS, Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case, and no judge having moved for rehearing en banc, said petition for rehearing is hereby denied. Judge Phillips dissents.

Entered by order of the Court

JAMES A. HIGGINS
Clerk

* Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, Retired, sitting by designation.

CERTIFICATE OF SERVICE

Three copies each of the Petition for a Writ of Certiorari and Appendix have been mailed this 25th day of

November, 1972, by depositing the same in a United States Mail Box, First Class, postage prepaid, addressed to Carol S. Agin, 3800 Lake Shore Drive, Apt. 5E, Chicago, Illinois, 60613, and Lewis R. Katz, 2145 Adelbert Road, Cleveland, Ohio 44106, attorneys for plaintiffs-appellants; Sidney Picker, Jr., 3079 Van Aken Boulevard, Shaker Heights, Ohio 44120, attorney for Women's Equity Action League; David Rubin, 1201 Sixteenth Street, N.W., Washington, D.C. 20036 and Jerry D. Anker, 1730 M. Street, N.W., Washington, D.C. 20036, attorneys for the National Education Association; Lucille Houston, 816 Engineers Building, Cleveland, Ohio 44114, attorney for the American Civil Liberties Union; Susan Deller Ross, 1800 G Street, N.W., Washington, D.C. 20506, attorney for the United States Equal Employment Opportunity Commission, and Jordan Rossen, 8000 East Jefferson Avenue, Detroit, Michigan 48214, attorney for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), *amici curiae*.

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